DOCUMENT RESUME

ED 195 036 EA 013 129

AUTHOR Mackey, Bruce C.
TITLE Hearing Officer's Report of Evidence.
PUB DATE 10 Oct 80
NOTE 15p.: Illinois Association of School Boards Student Discipline Workshop (Bloomington, IL, October 15, 1980).

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Discipline: *Discipline Policy: *Due Process: Expulsion: *Hearings: Legal Responsibility: Reports: Suspension
IDENTIFIERS Evidence: *Hearing Officers: Illinois

ABSTRACT

The Illinois School Code requires hearing officers in student expulsion or suspension review cases to provide the school board with a written summary of the evidence heard. While no particular form is required for the summary, this document presents a sample hearing report that can serve as a model for those preparing reports. The "facts" involved were those presented in a mock hearing conducted during the Student Discipline Workshop of the Illinois Association of School Boards. The sample report is annotated to clarify some of the significant "objections" made by the student's counsel during the "hearing" and to highlight certain key elements of the written summary. Such summaries should include statements describing the means by which participants were notified of the hearing (when the means of notification are prescribed by law), identifying the participants in the hearing and stating that witnesses were sworn, stating the charges against the student, and describing the nature of objections or motions made during the hearing as well as the disposition of those motions. (Author/PGD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED195036

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

HEARING OFFICER'S REPORT OF EVIDENCE

Illinois Association of School Boards
STUDENT DISCIPLINE WORKSHOP

Bruce C. Mackey
KLEIN, THORPE AND JENKINS, LTD.
180 North La Salle Street
Chicago, IL 60601
(312)984-6400

EA 013 129

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

B C. Mackey

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

INTRODUCTION

Although the Illinois School Code provides that when a school board uses a hearing officer in student expulsion or suspension review cases that the hearing officer shall "report to the Board a written summary of the evidence heard," the Code does not prescribe any particular form for reporting the evidence. The written summary which follows is suggested as one form which can be used by hearing officers. The facts in the written summary are roughly the same facts which were used in the mock hearing held during the workshop. The summary is annotated to highlight some of the more significant objections as well as certain key elements of the written summary of evidence.

While the law does not prescribe a particular format for reporting the evidence to the Board, there are certain features which should be contained in such a summary. Because the law requires that a written notice of an expulsion hearing be sent to the parents of a student by registered or certified mail, the written summary should indicate that the notice has been sent. Moreover, the report should identify the individuals who appeared at the hearing and should explain that all witnesses were sworn. The summary should, of course, state the charge or charges against the student and should include a description of the nature of any objections or motions made during the hearing as well as the disposition of those motions.

HEARING OFFICER'S REPORT OF EVIDENCE

STUDENT:	Robert Smith
GRADE:	Senior
SCHOOL:	Indian Lakes High School
BIRTH DATE:	June 1, 1962
DATE OF HEARING:	October 13, 1980
PLACE OF HEARING:	Indian Lakes High School Bloomingdale, Illinois

PERSONS PRESENT:

1.	Hearing Officer:	Ms. Kathleen Knepper
2.	Student's Mother:	Mrs. Mary Smith
3.	Attorney Representing Student:	Bruce C. Mackey
4.	Administration:	John B. Murphey Attorney At Law
		John Doe, Principal

SUMMARY OF EVIDENCE

The hearing was commenced at 3:05 p.m. on October 13, 1980. The mother of the student acknowledged that she had received notice of the hearing by hand delivery from the principal. The notice of the hearing was introduced as Exhibit A. The notice explained the time, place and purpose of the hearing. It charged the student with gross misconduct in that he was in possession of a controlled substance as that term is defined in Illinois law. Robert Smith, the student, was not present. His attorney, Mr. Mackey, explained that he ordered the student to stay at home to protect his right against self-incrimination; the student has also been charged in a pending action in juvenile court.

Mr. Murphey proceeded to make an opening statement describing the evidence in support of the charge.

Mr. Mackey made no opening statement but made a number of objections. His first objection was that the notice did not satisfy the statutory requirement because it was not sent by registered or certified mail.[1] This objection was overruled by the hearing officer because the mother admitted that she had received the notice of the hearing by hand delivery. Mr. Mackey also objected that the notice did not give the child or him adequate time to prepare for the expulsion. Notice was given to the mother on Friday, October 10, and the expulsion hearing was scheduled for October 13. The hearing officer noted the objection for the Board of Education's consideration.[2] Mr. Mackey also objected to the hearing officer, arguing that she was not impartial. He argued that a superintendent cannot be objective in a case involving one of her subordinate administrators. In denying this objection, the hearing officer explained that she had no prior knowledge of the facts in the case. In addition, she stated that she would not be making a judgment as to the propriety of the suspension or expulsion. Instead, she explained that her role was limited to hearing the evidence and preparing a written summary for the Board. She also pointed out that she does not discuss the facts of the case with either board members or administrators and that she is not present when the board discusses the case in executive session.[3]

The first and only witness called on behalf of the school was John Doe, the Administrative Assistant to the principal at Indian Lakes High School. His testimony is summarized below:

He has been employed by the school district for nine years. Two of those years he has served as the administrative assistant to the principal. When the building principal is absent, she asks him to manage the school in her absence. There is, however, no Board rule or policy relating to his authority in the principal's absence. It has been the practice during the nine years that he has been employed in the district for administrative assistants to take charge when the principal is absent.

On Friday, October 10, 1980, in the absence of the building principal, Mr. Doe was managing the school district. He arrived at approximately 7:45 a.m.; the school does not formally begin until 8:35 a.m. One of the newly hired physical education teachers, whose name Mr. Doe did not remember, informed him that she had seen a young man "hanging around" the faculty parking lot smoking. There have been serious problems with students in the parking lot this year. Two weeks ago a teacher's tires were slashed, for example. As a result, the administrators have been careful regarding observing students in the parking lot. There are no district rules prohibiting students from standing in the parking lot. In ract, students have to cross through the faculty parking lot to get from the main building to the student gymnasium. There is also no written policy regarding smoking, but several times a year it is announced that smoking is not permitted on school premises.

When Mr. Doe went to the faculty parking lot, he observed a student wearing a T-shirt which said "Bloomingdale Disciples." "Bloomingdale Disciples" was identified as a local gang or a social club which has caused problems around the school. Mr.

Mackey asked that the reference to "Bloomingdale Disciples" be stricken from the record on the grounds that the wording on the shirt is not relevant to proving the charge against the student and because the reference to the gang or club was designed to portray the student as a gang member.[4] Mr. Murphey pointed out that the reference was proper in that it gave the administrator reasonable suspicion to search the student. The objection was overruled.

Mr. Doe observed the student smoking. He asked the student for his name and the student identified himself as Robert Smith. He did not have his school I.D. card with him. The student maintained that he was merely waiting for a friend. Because Mr. Doe wanted to know if the student had any more cigarettes with him, he asked him to empty his pockets. The student told Mr. Doe that he had no right to search him. Mr. Doe informed him that because he was on school premises, Mr. Doe had the power to search him. The student was ordered to empty his pockets which he did. Among the contents of his pockets was an object which Mr. Doe identified as a "baggie" and which Mr. Doe stated that he "immediately recognized as having marijuana in it."

At this point in Mr. Doe's testimony, Mr. Mackey objected. He objected first that all testimony regarding the contents of the Smith boy's pants' pockets be excluded from evidence because the search was clearly illegal. He also objected to Mr. Doe's characterization of the substance as marijuana. Both objections were overruled by the hearing officer. The hearing officer agreed with Mr. Murphey's argument that the search was proper because of the factual circumstances, namely, Mr. Doe had a

reasonable suspicion that the student was violating school rules and regulations concerning smoking.[5] The hearing officer overruled the objection relating to Mr. Doe's characterization of the substance telling Mr. Mackey that he could cross-examine Mr. Doe on the point when it came time for cross-examination.

Subsequent to discovering the object in the student's pocket, Mr. Doe took the student to the principal's office and told him he was in "serious trouble." He then called Officer Donovan of the Indian Lakes Police Department who arrived within twenty minutes. The object found in the student's pocket and described by Mr. Doe as a "baggie" was given to Officer Donovan to have it field tested.

The student was then told to go home and that he was suspended until further notice. The student was also told that his parents would be contacted soon. Mr. Doe then prepared a letter advising Robert's parents that he had been suspended and that a hearing on his suspension would be scheduled for Monday, October 13. Although the letter was going to be sent by certified mail, when the mother of Robert came to the principal's office that afternoon, Mr. Doe handed the letter to Mrs. Smith.

On cross-examination, Mr. Mackey asked Mr. Doe whether there was any written rule or regulation authorizing him to suspend students. Mr. Doe answered that there was a rule or regulation authorizing principals to suspend students and since he was acting in the principal's place, he had the power to suspend students.[6] Mr. Mackey then asked Mr. Doe if he had had any special training in identification of controlled substances. Mr. Doe stated that the district had had an in-service workshop

for administrators the previous year. Mr. Mackey asked if he had been trained to identify marijuana by looking at it. Mr. Doe admitted that during the workshop they were told that a positive identification of marijuana cannot be made visually. When asked the exact amount of the substance in the bag, Mr. Doe was unable to describe the amount except that it filled maybe "one-fourth of the bag." Mr. Doe was then asked if they had received results of the field test of the substance. He stated that they had not received it yet but that they expected it shortly. Mr. Donovan did call and state that the results of the test showed to be "positive." Mr. Mackey then asked Mr. Doe if the student had been given a chance to know why he was being suspended and a chance to explain his side of the incident before he was suspended.[7] Mr. Doe stated he had not "specifically done that" because "it was clear to the student why he was being suspended."

Mr. Murphey then offered a closing argument in which he stated that the evidence introduced on behalf of the student clearly showed gross misconduct. He stated that the search of the student was entirely proper and that the possession of a controlled substance was gross disobedience or misconduct even in the absence of a rule because it violated state law.[8]

Mr. Mackey made several motions instead of a final argument. His first motion was to dismiss the entire proceeding against the student and to have all records of the incident expunged from the student's record because the student was not given a pre-suspension hearing as required by the pronouncements of the United States Supreme Court.[9] He also "moved to strike"

the proceedings on the ground that Mr. Doe was not a principal and did not have the authority to suspend a student. His final motion was directed to what he referred to as a "total absence of evidence." The basis for Mr. Mackey's argument was that Mr. Doe admitted that there was no way he could testify with assurance that the substance was marijuana and that the hearsay testimony of Mr. Donovan was not "competent" evidence.[10] The objection was noted in the record for the Board's consideration.

Attached hereto and made a part of this summary of evidence is School's Group Exhibit A consisting of pages 1 through 5.

I, KATHLEEN KNEPPER, certify that the above and foregoing correctly and accurately represents the proceedings held on October 13, 1980 regarding the behavior of Robert Smith, a student at Indian Lakes High School.

Respectfully submitted,

_____

KATHLEEN KNEPPER
Hearing Officer

FOOTNOTES

1 This objection was properly overruled. Although the applicable Statute, Section 10-22.6 of Chapter 122 of the Illinois Revised Statutes requires notice of an expulsion hearing to be given by "Registered or Certified mail," personal service such as was effected here is probably sufficient. In an analogous case involving notice of extension of a non-tenured teacher's probationary period, the Illinois Supreme Court stated:

> "It is true that the Statute prescribes registered mail as the vehicle for notification, whereas only ordinary mail was employed here, but where the plaintiff was notified in another manner and had actual knowledge that his probationary period had been extended, we recognize that the notice requirements have been satisfied." (Glover v. Board of Education, 62 Ill.2d 122, 340 N.E.2d 4 (1975)

2 The hearing officer here merely noted the objection for the Board of Education's attention. This is a proper procedure if the hearing officer is unsure of the correct disposition of the issue or if the hearing officer feels that because of the serious nature of the objection, it should be decided by the total Board of Education. The procedure in such a case is to make it clear in the record as to what the objection is and to record any arguments as to the merits of that objection by counsel. In respect to the objection involved here, it should be noted that an Illinois District Court held in Whitfield v. Simpson, 312 F.Supp. 889 (E.D. Ill. 1970) that two days notice was adequate in a student expulsion case.

3 The hearing officer properly stated for the record that she had no knowledge of the particular incident involved and that she would play no role in assisting the Board in making its determination as to the expulsion of the student. The objection was properly overruled. Absent a showing of actual bias, a school administrator is not automatically disqualified from serving as a hearing officer in a student discipline matter. There have been cases which have, however, found a procedure to be unfair to the student when an administrator is involved as both a witness to student misconduct and also serves as a judge of the student in the discipline matter. [Gonzales v. McEuen, 435 F.Supp. 460 (C.D. Col. 1977)

4 This is a close question, but the objection was most likely properly overruled. Normally, it would be prejudicial to introduce into evidence information irrelevant to the charge where that information, by its nature would tend to prejudice the student. Here, for example, information suggesting the student belonged to a gang would certainly be prejudicial to the student. However, it can be held as the hearing officer did, that the administrator's knowledge of the problems caused by a particular gang would be relevant to showing reasonable suspicion for searching the student.

5 It is not clear if the search here would be found proper by most courts in the country. In contrast to the higher standard of probable cause required in criminal courts, a much lower standard of reasonable suspicion is used in the school context. Assuming that the school had a policy against smoking as the administrator testified, his search of the student is likely to be proper where he saw the student smoking a cigarette. The key point is whether the District had a policy prohibiting smoking and possession of cigarettes. Absent proof of such a rule, the search would likely be found improper.

6 Section 10-22.6(b) of Chapter 122 of the Illinois Revised Statutes authorizes boards to promulgate "regulations" permitting "principals or deans of students of any school to suspend pupils guilty of gross disobedience or misconduct." It is doubtful that the argument made by the administrative assistant here would prevail. The statute says "principal" or "dean of students." An administrative assistant is neither.

7 The purpose of this objection, of course, is to point out that the pre-suspension hearing mandated by the United States Supreme Court in Goss v. Lopez (419 U.S. 565 (1975)) was not conducted. The administrative assistant's answer would not be sufficient to justify the failure to conduct such a hearing. Many school districts not only conduct a pre-suspension hearing but prepare a written memorial of the hearing and send that to the parents with the notice of expulsion or notice of suspension review hearing.

8 A key problem in this entire dismissal hearing has been the absence of any written rule or regulation stating that possession of a "controlled substance" is an offense punishable by suspension or expulsion. In the absence of a written rule stating that an offense is punishable by suspension or expulsion, the only offenses for which a student can be expelled in Illinois are offenses which are truly gross misconduct by any standard. [Linwood v. Board of Education, 463 F.2d 763 (7th Cir. 1972)]

9 As indicated earlier, the record here is defective because there was no pre-suspension hearing. This defect places the hearing officer, and later the Board, in a quandary. Clearly, the suspension is defective. Does that mean that the student cannot be expelled? Although there are no cases on point, it is submitted that the proper procedure would be for the Board to set aside the suspension if it found him guilty of possession of marijuana. In other words, a defective suspension should not prevent the Board from expelling a student.

10 The final objection made by the attorney representing the student was that hearsay evidence was improperly admitted. The general rule is that hearsay evidence can be admitted in a student discipline hearing. Although there are numerous cases where expulsions have been upheld on hearsay evidence, it is strongly suggested that where it is possible to obtain direct evidence, that evidence should be used. In this case, for example, the District should have had the officer testify. Some courts have held that a serious punishment such as expulsion cannot be justified if there has been a factual dispute as to a key issue. [De Jesus v. Penberthy, 344 F.Supp. 70 (D.Conn. 1972)]